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No. 80-788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In re Corrugated Container Antitrust Litigation
M.D.L. 310,

ADAMS EXTRACT COMPANY, ET AL.,
Petitioners,

vs.

CHARLES J. FRANEY AND ALEX HOPKINS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented

1. Whether a court has authority to determine that testimony will be "derived from" previously immunized testimony pursuant to the federal immunity statute, 18 U.S.C. § 6002, in the context of a motion to compel testimony over a claim of Fifth Amendment privilege?

2. Whether a witness may be ordered to testify over a claim of privilege against self-incrimination where it is determined that his testimony will be "derived from" previously immunized testimony and thus unavailable for use in future criminal prosecutions?

3. Whether deposition testimony is "derived from" previously immunized testimony under the federal immunity statute, 18 U.S.C. § 6002, where a transcript of the immunized testimony is used by deposing counsel to formulate the deposition questions?

Parties To The Proceeding Below

Plaintiffs:

Accurate Metal Weatherstrip Company, Inc.
Adams Extract Company
After Six, Inc.
Al Barker Publishing Co.
The Amberley Greeting Card Co.
Andre-Boudin Bakeries, Inc.
Arcadia Furniture Corp.
Atlas Container Co., Inc.
Austin Products Co.
Bateman Canning Co.
The Beaumont Co.
Bert Paley, Ltd.
Bodines, Inc.
Bookout & Mitchell Supply, Inc.
Bowman Dairy Company, Inc.
Burger King Corp.
Cantrell & Cochrane, Inc.
Carron Manufacturing Co., Inc.
Continental Nut Co.
Cook Distributing Co.
Cook Produce, Inc.
Co-Ordinated Industries, Inc.
Covington Fabrics Corp.
Dean Foods Co.
Dean Foods Products Company
Dean Milk Company Inc.
Denver Meat Co.
District Hotel Supply, Inc.
Doranne of California d/b/a Embassy Giftwares
Douglas Furniture Corp.
Draper Canning Co., Inc.
Draper-King Cole, Inc.
Dulaney Foods, Inc.

Erie Seating Co.
Falstaff Brewing Company
Fox Deluxe Pizza Co.
Furniture Plastics, Inc.
Gandy's Dairies, Inc.
Gateway Farms, Inc.
General Brewing Co.
Golden Quality Ice Cream Co.
Grace Brewing Co.
Great Northern Packaging Corp.
Green Bay Foods
Griffin & Brand Sales Agency, Inc.
Grist Mill Co.
Haeger Potteries, Inc.
Huron Packaging Corp.
Shell-Tex Fisheries, Ltd.
Sky View Cooling Co.
Snyder-Craft Co., Inc.
Speas Co.
Steak and Ale Restaurants of America
Sunmark, Inc.
Tierra Royal Potteries, Inc.
Town House Furniture Ltd.
Trappe Frozen Foods Corp.
United Farmers Cooperative, Inc.
United Food Services, Inc.
United Foods, Inc.
Universal Cooperatives, Inc.
Valley Avocado Sales, Inc.
Valley Farms, Inc.
Valley Plastics Inc.
Walters Brewing Company
West Publishing Co.
Westside Paper Co.
Williams Manufacturing Co.
Winona Industries
Winter Garden, Inc.
Wittek Gold Supply Co., Inc.

Non-Party Deponent-Appellants:

Charles Jerome Franey
Philip Fleischacker
Alex Hopkins

Non-Settling Defendant In *In re Corrugated Container Antitrust Civil Litigation,* M.D.L. 310:

The Mead Corporation

Other Defendants In *In re Corrugated Container Antitrust Civil Litigation,* M.D.L. 310:

Alton Box Board Company
Boise Cascade Corporation
Champion International, Inc.
The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
The Continental Group, Inc.
Corco, Inc.
Crown Zellerbach Corporation
Diamond International Corporation
Dura-Containers, Inc.
Fibre Box Association
Fibreboard Corporation
Georgia-Pacific Corporation
Green Bay Packaging, Inc.
Hoerner Waldorf Corporation
Inland Container Corporation
International Paper Company
Interstate Container Corporation
Longview Fibre Company
MacMillan Bloedel, Inc.
MacMillan Bloedel Containers Inc.
Menasha Corporation
Olinkraft, Inc.

Owens-Illinois, Inc.
Packaging Corporation of America
Potlatch Corporation
St. Joe Paper Company
St. Regis Paper Company
Southwest Forest Industries, Inc.
Stone Container Corporation
Union Camp Corporation
U.S. Corrugated Fibre-Box Company
Western Kraft East, Inc.
Westvaco Corporation
Weyerhaeuser Company
Willamette Industries

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vs.

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OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals, *In re Corrugated Container Antitrust Litigation, Appeal of Charles J. Franey, Appeal of Philip Fleishacker, Appeal of Alex Hopkins* (hereinafter, *Corrugated*), are reported at 620 F.2d 1086 (5th Cir. 1980) and are set forth in the Appendix at pp. 1a-17a. The opinions and orders of the United States District Court for the Southern District of Texas adjudging

Respondents Franey and Hopkins in civil contempt have not been reported. They are set forth in the Appendix at pp. 1b-5b, and pp. 6b-8b, respectively. The order of the Court of Appeals denying Petitioners' timely petition for rehearing and rehearing *en banc* is set forth in the Appendix at p. 1c.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit vacating the orders of contempt for failure to testify, was entered on June 19, 1980. A timely petition for rehearing and for rehearing *en banc* was denied on August 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

The federal immunity statute, 18 U.S.C. §§ 6001-6003 (1976) provides in pertinent part:

> [N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . .

18 U.S.C. § 6002.

STATEMENT OF THE CASE

Plaintiffs in this massive antitrust litigation seek review by this Court of a decision of the Court of Appeals for the Fifth Circuit, vacating, by a 2-1 vote, orders (the "Orders") of the District Court for the Southern District of Texas (the "District Court") adjudging Charles Franey ("Franey") and Alex Hopkins ("Hopkins") to be in contempt of court for refusing to answer questions propounded at their civil depositions. The

Court of Appeals vacated the Orders, ruling that Franey and Hopkins legitimately feared self-incrimination from answering the deposition questions.[1]

Franey and Hopkins are non-party witnesses in this private treble damage action against defendant manufacturers of corrugated containers.[2] Both Franey and Hopkins were employees of defendants during the period of the alleged price-fixing conspiracy and both testified under grants of "use" immunity pursuant to 18 U.S.C. § 6001 *et seq.* prior to or during the criminal trials which preceeded these civil actions. Hopkins testified under separate grants of statutory "use" immunity before a federal grand jury and at trial. Franey testified at trial under a grant of statutory "use" immunity and also testified in an interview conducted by the Department of Justice pursuant to a letter grant of "use" immunity.[3]

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[1] Philip Fleischacker had also appealed the District Court's order of contempt entered against him for his refusal to testify. The circumstances of his claim of Fifth Amendment privilege were identical to those of Franey and Hopkins and the three appeals were consolidated. Because Fleischacker appeared for deposition in New York under subpoenas issued by the District Court for the Southern District of New York, the Court of Appeals for the Fifth Circuit dismissed Fleischacker's appeal for lack of jurisdiction. (pp. 5a-8a.) Fleischacker's appeal is now awaiting decision before the Second Circuit Court of Appeals, *In re Corrugated Container Antitrust Litigation, M.D.L. No. 310, Appeal of Philip Fleischacker,* Docket No. 80-1090.

[2] Prior to trial, all but three defendants in this action entered into settlements with the Plaintiff class totaling over $300 million. Two additional defendants settled during trial. Mead Corporation did not settle and following fourteen weeks of trial, a jury found Mead to be guilty of the alleged price-fixing conspiracy and liable to Plaintiff class in excess of $1 billion. Judgment has not yet been entered against Mead. Appeals are expected.

[3] The Court of Appeals did not consider the validity of the letter grant of immunity because "the district court could have based its order compelling Franey to answer deposition questions solely on the grant of statutory immunity." (p. 11a, n.4)

Following the conclusion of the criminal trial, plaintiffs sought and obtained complete transcripts of Franey and Hopkins' immunized testimony in each of the above proceedings. In preparation for the civil depositions of Franey and Hopkins, deposing counsel reviewed and studied the questions and answers which comprised the immunized testimony. At the civil depositions, the questions asked Franey and Hopkins by deposing counsel, as found by the District Court, were limited to questions taken verbatim from their respective immunized testimony or questions directly based on and derived from that immunized testimony. (pp. 3b, 7b.) Despite this clear use of each witness' own immunized testimony in developing the deposition questions asked of them, both Franey and Hopkins refused to answer all substantive questions, claiming the Fifth Amendment privilege against self-incrimination.[4]

The District Court ordered both Franey and Hopkins to answer the propounded questions, ruling that use of the immunized testimony in developing the deposition questions asked of Franey and Hopkins would render their answers so clearly and thoroughly derived from the immunized testimony so as to be unusable in future criminal prosecutions against them. (pp. 3b, 7b.) In reaching its determination, the District Court relied on the decision of the Court of Appeals for the Eighth Circuit in *Appeal of Starkey*, 600 F.2d 1043 (8th Cir. 1979), where the court, on identical facts, compelled testimony over a claim of privilege.

In a 2-1 decision, the Fifth Circuit vacated the District Court's Orders of contempt, finding that the District Court "acted improperly in ruling that there existed no danger of self-incrimination." (p. 2a.) The majority did not dispute the District Court's factual finding that the deposition questions were taken verbatim or derived from the transcripts of Franey and Hopkins' immunized testimony. The Court of Appeals held, however, that a court lacked authority, in the context of a

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[4] Franey and Hopkins were among over one hundred witnesses in this litigation who asserted the Fifth Amendment privilege against self-incrimination and refused to testify.

motion to compel testimony, to determine whether testimony would be "derived from" immunized testimony pursuant to 18 U.S.C. § 6002, stating that:

> [I]t was inappropriate for the [District] Court, . . . [in determining] whether the witnesses were entitled to invoke the fifth amendment, to consider whether the testimony was "tainted" such that it could not be used against them in future prosecutions.

(p. 12a.)

While the majority recognized that section 6002 "contemplates that district courts will have the responsibility to determine what is derived use of immunized testimony," the Fifth Circuit held that "the authority to make that determination is limited to the situation where the witness has been indicted and the Government is seeking to introduce evidence to secure a criminal conviction." *Id.*

Judge Frank M. Johnson, in dissent, recognized that "(i)t has always been for the courts to determine whether an assertion of the privilege is proper", and that "(c)ourts have also always decided the taint question—whether evidence should be excluded as derivative of immunized testimony". (p. 16a, citations omitted.) He concluded that it was well within a court's authority to make a prospective determination of taint and that "any prosecutorial use of the deposition testimony, required by the district judge would, without any question, be barred as derivative of the compelled evidence." *Id.*

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED TO RESOLVE A DIRECT CONFLICT BETWEEN THE COURTS OF APPEALS

The Fifth and Eighth Circuits are in direct conflict over the issues raised in this Petition. In a situation identical to the one at bar, the Eighth Circuit, in *Appeal of Starkey,* 600 F.2d 1043 (8th Cir. 1979), compelled civil deposition testimony over a claim of Fifth Amendment privilege where deposing counsel used the deponent's prior immunized testimony to develop subsequent deposition questions asked of him.

Like Franey and Hopkins, Starkey was a key employee of a company indicted by the federal government for criminal price fixing. Starkey testified before a federal grand jury investigating the alleged price fixing under a grant of "use" immunity pursuant to 18 U.S.C. § 6001 *et seq.* Following conclusion of the criminal proceedings, in which all defendants plead *nolo contendere,* the State of Arkansas commenced a civil treble damage action against Starkey's employer. During discovery in the civil case, Starkey's immunized grand jury testimony was made available to plaintiff.

As in the case at bar, deposing counsel used Starkey's immunized testimony to question him at his civil deposition. Many of the deposition questions were taken verbatim from the immunized testimony while the balance were follow-up questions derived from the immunized testimony. Starkey refused to answer these questions claiming the Fifth Amendment privilege against self-incrimination. The Eighth Circuit found, however, that the "obvious dependence on the [immunized] grand jury testimony in the deposition questions" would leave the deposition testimony "tainted and unavailable for criminal prosecution", *Id.* at 1047, and ordered Starkey to answer questions "within the same time, geographical and substantive

framework as the grand jury testimony." *Id.* at 1048. The court specifically rejected the notion that it was exceeding its authority in compelling the testimony, finding instead that it was "merely fulfilling its proper duty to determine what is a derived use of immunized testimony." *Id.*

Thus faced with identical factual situations, the Eighth Circuit compelled a witness to testify over a claim of privilege while the Fifth Circuit, in this case, permitted a witness to remain silent. In addition to this conflict in results reached by the Circuits, the underlying rationale for the Fifth Circuit's ruling—that it lacked *authority* to determine whether testimony is "derived from" immunized testimony in any context other than "the situation where the witness has been indicted and the Government is seeking to introduce evidence to secure a criminal conviction"—is in conflict with a decision by Justice (then Judge) Stevens for the United States Court of Appeals for the Seventh Circuit and a decision by a separate panel of the Eighth Circuit. In *Patrick* v. *United States,* 524 F.2d 1109, 1120 (7th Cir. 1975), Justice Stevens made a prospective determination of taint in a suit to enjoin the assessment of a tax. In *Little Rock School District* v. *Borden, Inc.,* 1930-2 Trade Cases ¶ 63,522 at p. 76,783 (8th Cir. 1980), the Eighth Circuit specifically upheld the authority of a court to determine derived use in the context of a motion to compel testimony over a claim of privilege.[5]

Because there is a clear conflict between the Circuits as to the circumstances in which testimony can be compelled over a claim of privilege and as to the authority of a court to make determinations necessary to analyze the propriety of a Fifth Amendment claim, certiorari should be granted.

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[5] The Court in *Borden* held that deposition testimony could be derivative of prior immunized testimony even absent deposing counsel's use of the immunized testimony. Petitioners do not assert this broader position herein.

II.

THE WRIT SHOULD BE GRANTED TO CORRECT THE COURT OF APPEALS' ERRONEOUS DETERMINATION THAT A WITNESS CANNOT BE COMPELLED TO TESTIFY WHERE HIS TESTIMONY WOULD BE DERIVED FROM HIS PREVIOUSLY IMMUNIZED TESTIMONY

The Fifth Circuit was plainly in error in holding that a witness could not be compelled to testify over his Fifth Amendment objection where his testimony is "directly or indirectly derived from" his previously immunized testimony. Because the tainted testimony could not be used against the witness in a subsequent criminal prosecution, the basis for any Fifth Amendment objection disappears. Permitting invocation of the Fifth Amendment under such circumstances, as the Court of Appeals did here, is a needless restriction on the fundamental right and duty of the federal courts to best ascertain the truth from all available evidence.

The Fifth Amendment to the United States Constitution protects a person from being forced to give testimony which can be used against him in a criminal proceeding. However, under the federal immunity statute, 18 U.S.C. § 6002,

> [N]o testimony or other information compelled under the order (*or any information directly or indirectly derived from such testimony* or other information) may be used against the witness in any criminal case.... (Emphasis added.)

Thus, if deposition testimony is "directly or indirectly derived from" immunized testimony, it cannot be used in a future prosecution of the witness, and testimony, which may be necessary to reach a truthful resolution of the litigation may, and therefore, must be compelled. *Kastigar* v. *United States,* 406 U.S. 441 (1972). Common sense and substantial case precedent support this conclusion.

Once a witness has testified under a grant of "use" immunity, a "very heavy burden" attaches to evidence offered in a subsequent criminal prosecution of the witness.

> This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

Kastigar, supra, 406 U.S. at 460. Courts have strictly construed the requirement that subsequent evidence be "wholly independent" of the compelled testimony such that *any* showing of *use* of compelled testimony in developing subsequent evidence taints the subsequent evidence. *See, e.g., United States* v. *Nemes,* 555 F.2d 51 (2d Cir. 1977); *United States* v. *McDaniel,* 482 F.2d 305 (8th Cir. 1973).

Applying this strict standard to the facts of this case, it cannot be questioned that where deposing counsel use immunized testimony to develop deposition questions, the subsequent testimony will be "derived from" the immunized testimony. The Eighth Circuit made this very ruling in *Appeal of Starkey, supra.*[6] The Court of Appeals' refusal to apply this rule in this case on the ground that it lacked authority to determine the "taint" issue is erroneous.

Because the privilege against testifying frustrates the search for truth, courts have always exercised their inherent power —and indeed their obligation—to determine the circumstances

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[6] In the only other decision written on this issue, a court determined that testimony could not be compelled because the questioner did not even have access to the immunized testimony and thus could not have *used* the immunized testimony as a basis for the subsequent deposition questions:

> Here, plaintiffs have not had access to the witnesses' grand jury testimony: the questions plaintiffs have asked are not based on the immunized testimony, but rather on the much broader discovery which has occurred in this civil case. . . .

In re Folding Carton Antitrust Litigation, 465 F.Supp. 618 (N.D. Ill.), *rev'd on other grounds,* 609 F.2d 867 (7th Cir. 1979).

in which an assertion of the privilege would be proper. *Marchetti* v. *United States,* 390 U.S. 39, 53 (1968); *Hoffman* v. *United States,* 341 U.S. 479, 486 (1951). When the privilege is improperly asserted, courts have always compelled the witness to testify:

> The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . and to require him to answer if it clearly appears to the court that he is mistaken.

Id.

In assessing the validity of a Fifth Amendment claim, courts have routinely determined the applicability of statute of limitations, double jeopardy, or immunity bars which would either eliminate the possibility of future prosecutions of the witness or prevent use of the witness' testimony in a future criminal action. Courts have not hesitated to reach these complex issues in the context of a motion to compel testimony over a claim of privilege despite the fact that statute of limitations, immunity and double jeopardy bars are normally only considered as affirmative defenses during criminal trials. Certainly nothing in the immunity statute itself or in any case cited by the majority below limits the circumstances in which a court may determine derived use.

Moreover, compelling testimony "derived from" immunized testimony over a claim of privilege does not amount to a judicial creation of immunity.[7] A court is no more "creating"

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[7] The case of *Ellis* v. *United States,* 416 F.2d 791 (D.C. Cir. 1969), cited by the majority below (p. 14a, n.7) as an example of judicial "creation" of immunity is easily distinguishable. In *Ellis,* there was no prior grant of immunity. The district court compelled testimony over a claim of privilege *solely* because of the after-the-fact exclusionary rule which prevents evidence from being introduced against a witness where it has been compelled over his claim of privilege. *See In re Folding Carton Antitrust Litigation,* 609 F.2d 867, 872, n.11; *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964). Since nothing else prevented the testimony from being used in a subsequent prosecution (i.e. statute of limitations, double jeopardy, immunity, waiver) the district court was found to have "created" immunity. *Ellis, supra,* 416 F.2d at 796.

immunity when it determines derivative use than when it denies the privilege because a statute of limitation or double jeopardy would bar future prosecution. In each of these situations, the court's obligation is the same: to determine whether the witness has a real and substantial fear of prosecution from testifying. *United States* v. *Apfelbaum,* 63 L.Ed2d 250, 262 (1980). In each of these situations, it is for the court to decide whether the operative statute effectively bars use of the testimony in a future prosecution and to overrule a claim of privilege if it does.

Thus the Fifth Circuit erred in deciding that it lacked authority to determine derived use in the context of a motion to compel and erred in refusing to compel the testimony of Respondents herein. This Court should grant certiorari to prevent future applications of the Court of Appeals' erroneous rulings.

III.

THE WRIT SHOULD BE GRANTED TO RESOLVE IMPORTANT QUESTIONS CONCERNING ADMINISTRATION OF THE JUDICIAL SYSTEM AND TO PREVENT UNWARRANTED REFUSALS TO TESTIFY

Whether deposition testimony derived from immunized testimony can be compelled over a claim of Fifth Amendment privilege is an important, continually recurring question of law. While Petitioners suggest above that this Court's decision in *Kastigar* controls the analysis of the issue presented here, the opinion of the Fifth Circuit emphatically denies *Kastigar's* applicability. The Fifth Circuit has either misunderstood its role in applying this Court's directive or "derived" testimony is indeed conceptually different from any other evidence derived from use of immunized testimony. In either case, the issues presented are so fundamental to an ordered system of both justice and personal liberties and so often recurring in cases before the courts, that they should be addressed and resolved by this Court.

For centuries the Anglo-American legal systems have granted to the courts the general authority to obtain every person's testimony. While there is, without question, a limitation imposed on this power to preserve the fundamental freedom from self-incrimination, important private litigation[8] may be severely handicapped by wholesale invocation of the Fifth Amendment. Indeed, those witnesses best able to aid the court to reach a correct judgment by truthfully testifying to wrongdoing are precisely those persons who invoke the Fifth Amendment.

While witnesses may of course withhold testimony if it can be used against them in future criminal proceedings, where, as here, witnesses have given critical testimony under immunity, their knowledge can be made available in the form of "derived" testimony without jeopardizing their Fifth Amendment rights. Yet, in the absence of a uniform rule enunciated by this Court, the ability to compel testimony from such witnesses and the witness' ability to protect themselves from incrimination has been dependent upon the jurisdiction in which they are found.

The case at bar presents a prime example of the anomolous results the existing conflict between the Circuits may generate. Another witness in this action, Philip Fleischacker, was compelled to testify over his claim of privilege for the same reasons Franey and Hopkins were compelled to testify. However, because Fleischacker was found and served with a subpoena to testify in New York, the Fifth Circuit dismissed his appeal for lack of jurisdiction and the validity of his claim of privilege is now being determined by the Second Circuit. Thus, without direction from this Court, even witnesses in the same

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[8] This Court has often recognized that Congress sought to encourage private litigants to assist federal and state governments' enforcement of national economic policies, as expressed in the antitrust laws, including Section 1 of the Sherman Act. *See e.g., Hawaii* v. *Standard Oil Co. of California,* 405 U.S. 251, 262 (1972); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321, 336 (1971); *Hanover Shoe* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968); *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 139 (1968).

case may be subject to different Fifth Amendment standards and litigants may be unable to obtain important testimony solely because witnesses are found in certain jurisdictions.

Equally troubling is the Fifth Circuit's refusal to exercise its authority to determine the taint issue in considering the propriety of a Fifth Amendment claim. The need for exercise of this authority is clear: should courts abstain from deciding questions relevant to determination of the privilege during a motion to compel, there would be no mechanism to regulate its exercise; witnesses could simply refuse to testify even though they had no legitimate basis for doing so. Such a result would cripple the fact finding process and expand the bounds of the Fifth Amendment privilege beyond anything contemplated by its framers or approved by this Court in *Kastigar*. Allowing the Fifth Circuit's abstention to stand will permit important witnesses to improperly block the search for truth by refusing to testify and will severely undercut judicial authority to determine the factual basis behind Fifth Amendment claims.

CONCLUSION

For all of the foregoing reasons, Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit vacating the District Court's Orders of contempt for refusal to testify.

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November 12, 1980

APPENDIX A

In re CORRUGATED CONTAINER ANTI-TRUST LITIGATION.

Appeal of Charles J. FRANEY.

In re CORRUGATED CONTAINER ANTI-TRUST LITIGATION.

Appeal of Philip FLEISCHACKER.

In re CORRUGATED CONTAINER ANTI-TRUST LITIGATION.

Appeal of Alex HOPKINS.

Nos. 80-1284, 80-1307 and 80-1338.

United States Court of Appeals,
Fifth Circuit.

June 19, 1980.

Rehearing and Rehearing En Banc
Denied Aug. 14, 1980.

Appeals from the United States District Court for the Southern District of Texas.

Before TJOFLAT, FAY and FRANK M. JOHNSON, Jr., Circuit Judges.

TJOFLAT, Circuit Judge:

Phillip Fleischacker, Charles J. Franey, and Alex Hopkins bring these consolidated appeals from orders of the District Court for the Southern District of Texas holding them in civil contempt for invoking the fifth amendment privilege against self-incrimination and refusing to answer questions posed to

them at civil depositions.[1] The court had instructed them to answer the questions, ruling that the fifth amendment right to remain silent was unavailable to them since their deposition testimony could not possibly be used against them in any future criminal proceeding. We vacate the orders holding Franey and Hopkins in contempt because we conclude that the court acted improperly in ruling that there existed no danger of self-incrimination. We must dismiss Fleischacker's appeal for lack of jurisdiction.

I.

Fleischacker, Franey, and Hopkins are non-party witnesses in *In re Corrugated Container Antitrust Litigation,* M.D.L. No. 310, a private, multidistrict, antitrust action. That litigation was set on foot by a two-year federal grand jury investigation of allegations of price-fixing in the corrugated paper container industry. The grand jury investigation resulted in felony indictments against nine manufacturers of corrugated products and nine individuals and misdemeanor indictments against an additional five manufacturers and seventeen individuals. There followed a criminal trial in the district court for the Southern District of Texas. A jury acquitted those defendants who stood trial of all charges.

Fleischacker and Hopkins both testified before the grand jury after the district court, acting on the Government's petition, had entered an order granting them "use" immunity pursuant to 18 U.S.C. §§ 6001-6003 (1976) (immunity statute). Although Franey was not subpoenaed to appear before the grand jury, he submitted to an interview with Department of

[1] Pursuant to the recalcitrant witness statute, 28 U.S.C. § 1826 (1976), the district court sentenced each of the appellants to sixty days imprisonment and a fine of five thousand dollars. The court stayed execution of the sentences pending the filing and determination of these appeals.

Justice attorneys in exchange for a letter from the Department of Justice promising that any information he revealed would not be used against him in any criminal proceeding. The Government transcribed the Franey interview and presented it to the grand jury. During the criminal trial, the Government called Franey and Hopkins as witnesses. They testified after the prosecutor obtained orders granting them statutory use immunity.

While the grand jury investigation and the subsequent criminal trial were in progress, purchasers of corrugated products filed forty-four class and eleven non-class treble damages actions against corrugated product manufacturers, some of which were indicted by the grand jury. The plaintiff purchasers alleged that the defendants had engaged in a nationwide conspiracy to fix the prices of corrugated containers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). The Judicial Panel for Multidistrict Litigation consolidated those actions, pursuant to 28 U.S.C. § 1407 (1976), in the Southern District of Texas under the caption *In re Corrugated Container Antitrust Litigation.*

After the conclusion of the criminal trial, the plaintiff class in the consolidated civil action subpoenaed Fleischacker, Franey, Hopkins, and numerous other witnesses who had testified before the grand jury or during the criminal trial, requiring them to appear for depositions and to produce documents. Fleischacker, Franey, and Hopkins were all employees of defendant corporations during the period of the alleged price-fixing conspiracy. Fleischacker was deposed in New York, New York on January 22, 1980, and Hopkins, in Houston, Texas on January 30, 1980. Both refused to answer any questions concerning their alleged knowledge of or participation in the alleged price-fixing conspiracy, asserting their fifth amendment privilege against self-incrimination. Franey was deposed in Houston on March 4, 1980, and he, too, responded with silence to every substantive question. That same day, the

plaintiff class went before the district court in Houston, seeking an order compelling Franey to testify. On the court's order, Franey appeared for deposition in open court on March 5, 1980. After listening to the questions, the court ordered Franey to answer. Again, he refused.

On March 6, the court entered Pretrial Order No 40, adjudging Franey in civil contempt. The court concluded that the fifth amendment privilege was not available since, "[c]learly, Mr. Franey cannot be prosecuted in either state or federal courts using the testimony thus elicited. *Kastigar* v. *United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)." Record in No. 80-1284, vol. 1, at 12. The court explained:

> This is because all the questions are either taken verbatim from the transcripts of his immunized testimony [in his interview with the Department of Justice attorney and at the criminal trial] or are so closely related in subject matter and so clearly derived from the immunized testimony as to be thoroughly tainted and inadmissible against him in any conceivable future prosecution.

Id. at 14.

Also on March 6, the court granted the class plaintiffs' motion to enter Pretrial Order No. 39. That order provides that the Honorable John V. Singleton, Jr., Judge of the United States District Court for the Southern District of Texas shall exercise the powers of a District Judge for the Southern District of New York for the purpose of overseeing the deposition of Philip Fleischacker.

Class plaintiffs obtained a subpoena from the United States District Court for the Southern District of New York requiring Fleischacker to appear for a continuation of his deposition in New York on March 10, 1980. Judge Singleton, in Houston, presided over that deposition by means of a speaker-phone connection. Deposing counsel asked Fleischac-

ker a series of questions taken verbatim from the transcript of his immunized grand jury testimony[2] and further questions that counsel said were "derived" from the immunized testimony. Although Judge Singleton ordered Fleischacker to answer, he persisted in his invocation of the fifth amendment. Judge Singleton held him in contempt of court, citing the reasons set forth in Pretrial Order 40. Record in No. 80-1307, vol. 2, at 71.

Hopkins' deposition resumed in Houston on March 19, 1980. When Hopkins asserted his fifth amendment privilege, the deposition was recessed and continued in open court before Judge Singleton. Counsel asked him questions taken verbatim from his grand jury and trial testimony and questions purportedly "derived" from the immunized testimony. The court held Hopkins in contempt for his continued refusal to answer. Again, the court's order is based on a ruling that the answers to the questions "would be so clearly and thoroughly derived from the immunized testimony that they could never be used to prosecute Mr. Hopkins and therefore that he has no legitimate fear of self-incrimination. . . . " Record in No. 80-1338, at 24.

II

Fleischacker first raises the issue whether the Fifth Circuit Court of Appeals has jurisdiction to decide his appeal. We agree with him that this court lacks jurisdiction and that the appeal should be heard by the Court of Appeals for the Second Circuit.

The District Court for the Southern District of New York issued the subpoena requiring Fleischacker to appear for the March 10 deposition under the authority of Fed.R.Civ.P. 45. Rule 45(d)(2) provides:

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[2] In February 1980 the court had ordered the Government to disclose to the plaintiff class the transcripts of the grand jury testimony of numerous witnesses, including Fleischacker, Franey and Hopkins. That order is now on appeal before the Fifth Circuit in a separate proceeding.

> A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

This rule makes it clear that Fleischacker, who was in the vicinity of New York, could have been required to appear for a deposition only in, or near, New York. He certainly could not have been compelled to travel to Houston, in the Southern District of Texas, to be deposed. As a non-party witness, he was not even subject to the jurisdiction of the District Court for the Southern District of Texas.[3] The policy behind the rule is to avoid unnecessary inconvenience and expense to deponents.

The same policy concern underlies Fed.R. Civ.P. 37, which governs the imposition of sanctions upon persons unjustifiably resisting discovery. Rule 37(a)(1) provides: "An application for an order to a deponent who is not a party shall be made to

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[3] As the court observed in *Lincoln Laboratories, Inc.* v. *Savage Laboratories, Inc.*, 27 F.R.D. 476, 477, 478-79 (D.Del.1961):

> It is obvious that the court in which the action is pending stands in a different position as to parties, or officers or agents of corporate parties, as to whom it has personal jurisdiction that it does as to "disinterested" witnesses of whom it has no personal jurisdiction, and especially where the deposition is taken in a district other than that in which the litigation is pending. . . .
>
> If the party or witness refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of *that court.* If this witness was a "disinterested witness", the court in the district where the litigation is pending would ordinarily have no jurisdiction over that witness and could not hold him in contempt.

the court in the district where the deposition is being taken." This provision indicates that the only court that had the power to compel Fleischacker, a non-party deponent, to answer questions at a deposition conducted in the Southern District of New York was the district court sitting in that district. Rule 37(b)(1) provides that the power to enter sanctions against a deponent who disobeys an order to answer deposition questions also belongs to the court in the district in which the deposition is being taken.

If *In re Corrugated Container Antitrust Litigation* were not a section 1407 multidistrict case, then, there could be no question that a subpoena requiring Fleischacker to appear for a deposition would have to be issued by the District Court for the Southern District of New York—or, perhaps, the District Court for the District of New Jersey—as would an order compelling him to answer questions or an order holding him in contempt of court for refusing to answer. Of course, an appeal from that contempt order would be proper only in the Second Circuit Court of Appeals, "the court of appeals for the circuit embracing the district" in which the reviewable decision was rendered. 28 U.S.C. § 1294 (1976).

Under section 1407(b), the judge to whom a multidistrict case is assigned, "may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings." It was this provision that enabled Judge Singleton to preside over Fleischacker's deposition in New York. In ordering Fleischacker to respond and in holding him in contempt, Judge Singleton was exercising the powers of a district judge of the District Court for the Southern District of New York. As the legislative history of section 1407 indicates, his actions were limited by the ordinary operation of the Rules of Civil Procedure:

> By the term "pretrial proceedings" the committee has reference to the practice and procedure which precede the trial of an action. These generally involve deposition and discovery, and, of course, are governed by the Federal Rules of Civil Procedure.

H.R.Rep. No. 1130, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U.S. Code Cong. & Admin.News, pp. 1898, 1900.

Judge Singleton recognized in Pretrial Order No. 39 that the purpose of the section 1407 mechanism is to maximize the efficiency of discovery in multidistrict cases:

> This court will preside rather than appoint a deposition judge because the matters to be examined and the objections which will probably arise are so inextricably interwoven with the delicate and complex structure of this litigation as to make it extremely difficult for a judge unfamiliar with the whole case to preside.

Record in No. 80—1307, at 1. This purpose may be fully served without considering Judge Singleton's orders compelling Fleischacker to testify and holding him in contempt to be orders of the District Court of the Southern District of Texas. And to consider them such would be contrary to the provisions of Rule 37 requiring that orders directed to recalcitrant deponents be issued in the district in which the deposition is taken. Moreover, it would defeat the Rules' strong policy of minimizing inconvenience to non-party witnesses to require Fleischacker and others in his position to travel thousands of miles to appeal a Rule 37(b)(1) contempt order.

Therefore, we must conclude that this court lacks jurisdiction to hear Fleischacker's appeal.

III

We now turn to the question whether the trial court erred when it entered the orders holding Franey and Hopkins in contempt.

The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." This privilege against compulsory self-

incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. . . ." *Kastigar* v. *United States,* 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972). A witness may properly invoke the privilege when he "reasonably apprehends a risk of self-incrimination, . . . though no criminal charges are pending against him, . . . and even if the risk of prosecution is remote." *Wehling* v. *Columbia Broadcasting System,* 608 F.2d 1084, 1087, n. 5 (5th Cir. 1979) (citations omitted).

The *Wehling* test indicates that a court must ordinarily make two inquiries to determine whether a witness is entitled to assert the privilege and refuse to respond to questioning. First, the court must determine whether answers to the questions might tend to reveal that the witness has engaged in criminal activities. If the answers could not be incriminatory, the witness must answer. *Zicarelli* v. *New Jersey State Commission of Investigation,* 406 U.S. 472, 92 S.Ct. 1670, 32 L.Ed.2d 234 (1972). If answering the questions might incriminate the witness, the court must next ask whether there is a risk, even a remote risk, that the witness will be prosecuted for the criminal activities that his testimony might touch on. As the Seventh Circuit recently observed:

> [This determination does not depend] upon a judge's prediction of the likelihood of prosecution. Rather, . . . it is only when there is but a fanciful possibility of prosecution that a claim of fifth amendment privilege is not well taken. . . . When a witness can demonstrate any possibility of prosecution which is more than fanciful he has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster.

In re Folding Carton Antitrust Litigation, 609 F.2d 867, 871 (7th Cir. 1979) (citations omitted).

We have no doubt that Franey and Hopkins have met both requirements of this test. The plaintiff class seeks their testimony concerning their knowledge of and participation in the

alleged nationwide price-fixing conspiracy. Their answers to the deposition questions may well reveal that they have violated federal and state criminal antitrust laws. The risk that they will be prosecuted for such crimes is certainly more than fanciful. There has been no suggestion that the applicable statutes of limitations have run, and, as Hopkins has testified, a federal grand jury sitting in Ohio has begun its own investigation of the corrugated container industry. Deposition of Alex Hopkins, at 39-40.

Even if a witness establishes that he has a reasonable fear of self-incrimination and that there is some risk of prosecution, he can be compelled to testify if he is first granted "use" immunity pursuant to 18 U.S.C. §§ 6001-6003. Section 6002 provides that when a witness is compelled by a disctrict court order to testify over a claim of fifth amendment privilege:

> [T]he witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

In *Kastigar* v. *United States,* 406 U.S. at 453, 92 S.Ct. at 1661, the Supreme Court held that section 6002 immunity "from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege."

Franey and Hopkins both were granted such statutory immunity upon the Government's petitions for immunity orders to compel testimony before the Houston grand jury or at the criminal trial.[4] Section 6003 provides that an immunity order may be entered only at the request of a United States Attorney. Since the Government is not a party to the private antitrust action, a new grant of statutory immunity to compel the desposition testimony of Franey and Hopkins was unavailable. *In re Daley,* 549 F.2d 469, 479 (7th Cir.), *cert. denied* 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 89 (1977).

The district court found, however, that no new grant of immunity was necessary since the deposition testimony of Franey and Hopkins would be "clearly and throughly derived from the immunized testimony previously given" and thus inadmissible in "any conceivable future prosecution." Record in No. 80-1338 at 19, 20. Because the deposition testimony would be thus "tainted," the court reasoned, neither witness could have a "legitimate fear of self-incrimination." *Id.* at 20, 25.[5]

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[4] Before Franey was granted statutory immunity during the criminal trial, the Department of Justice gave him a letter promising him immunity in exchange for his answers to interview questions posed by a Department of Justice attorney. Since we suppose that the district court could have based its order compelling Franey to answer deposition questions solely on the grant of statutory immunity, we find it unnecessary to consider the validity of the letter grant of immunity.

[5] The district court relied on *Appeal of Starkey,* 600 F.2d 1043 (8th Cir. 1979), as authority for its ruling. In *Starkey,* the court held that a witness at a civil deposition had no right to invoke his fifth amendment privilege against self-incrimination since the deposition testimony would be tainted by grand jury testimony that the witness had given under a grant of immunity. For the reasons we state in text, we disagree with the Eighth Circuit's apparent assumption that the district court had the authority to determine whether the grand jury testimony would be "tainted." Nevertheless, the result in *Starkey* may well be correct since the state attorney general, the only potential prosecutor, was a party to the civil litigation and was the party seeking the deposition testimony. By arguing that the testimony would be tainted, the attorney general conceded that the testimony would be inadmissible in a future prosecution. This concession may itself have operated as a grant of immunity.

The district court's reasoning indicates that the court had misconstrued its role in applying the immunity statute. Since the witnesses had not been—in fact, could not have been—granted immunity to compel their deposition testimony, the only issues before the court were the two comprised within the test restated by this court in *Wehling:* whether answers to the deposition questions might tend to reveal that the witnesses have engaged in criminal activities, and whether the witnesses face possible criminal prosecution. The court apparently attempted to fit its rulings within the framework of this test when it suggested that the deposition testimony would not be "incriminatory" since it would be "tainted." The existence of immunity or of derivative "taint" would have no bearing on the question whether testimony would be "incriminatory," however. Incriminatory testimony is simply testimony that suggests that the witness may have committed a crime. When incriminatory testimony is offered under a grant of immunity, the testimony remains incriminatory despite the immunity. Thus it was inappropriate for the court, in applying the two-part test to determine whether the witnesses were entitled to invoke the fifth amendment, to consider whether the testimony was "tainted" such that it could not be used against them in future criminal prosecutions.

Nor did the immunity statute itself confer on the court the power to rule that Franey and Hopkins must testify on the ground that the compelled testimony would be "derived from the immunized testimony previously given." Although it is true that section 6002 contemplates that district courts will have the responsibility of determining what is a derived use of immunized testimony, the authority to make that determination is restricted to the situation where the witness has been indicted and the Government is seeking to introduce evidence to secure a criminal conviction. This notion that the issue of "taint" can be raised only in such a context is implicit in the decisions holding that the Government must bear the burden of dis-

proving "taint". In *Kastigar,* for example, the Supreme Court observed that once a defendant demonstrates that he has testified under a grant of immunity, the prosecution has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 460, 92 S.Ct. at 1665. Since the Government must bear the burden of proof on the issue of "taint," it follows that the issue was not properly raised in the present case, where the Government is not even a party.

The district court's rationale for compelling Franey and Hopkins to testify could be applied to override the fifth amendment claim of any witness any number of times, so long as the witness has previously testified under a grant of immunity. A court's role in the procedure that the district court has adopted would be to probe the mind of the questioner to ascertain that he is familiar with the substance of the immunized testimony. Even if the questioner were ignorant of the prior testimony, the court could ensure "taint," and thus compel the witness to answer, by seeing to it—as the court did here—that the questioner had a transcript of the immunized testimony on which to "base" his questions. And even if the court's finding that the witness' testimony would be "derived" from immunized testimony were manifestly wrong, the court's order compelling the testimony would operate to immunize the testimony because of "the well-established rule that if a district court errs in making a ruling on privilege an after-the-fact exclusionary rule will apply to prevent the introduction of that evidence against the witness." *In re Folding Carton,* 609 F.2d at 872, n. 11.[6] The resulting proliferation of "immunized" testi-

[6] This "exclusionary" rule does not itself buttress the order compelling Franey and Hopkins to testify. As the *Folding Carton* court emphasized, the rule "is solely remedial and cannot be used as a rationale to support a judicial decision which contravenes the fifth amendment's protection." *In re Folding Carton Antitrust Litigation,* 609 F.2d 867, 872, n. 11 (7th Cir. 1979).

mony would make it almost impossible for the Government, in a subsequent criminal trial, to sustain its heavy burden of proving that its prosecution is untainted.

In the absence of the district court's ruling that their deposition testimony would be "derived" from immunized testimony, Franey and Hopkins certainly could have legitimately invoked their privilege to remain silent. It is only the court's finding that their testimony will be "tainted" that is offered to support the abrogation of their fifth amendment privilege. In effect, then the district court has granted immunity to Franey and Hopkins of its own accord.[7] In addition to being contrary to the explicit provisions of the immunity statute that provide for an order of immunity only on the application of a government attorney, the court's action undermines the policies of the statute. As the Seventh Circuit observed in *In re Daley,* 549 F.2d at 478-479 (7th Cir. 1977):

> [O]nce the bar of the privilege against self-incrimination has been raised by the witness, the decision whether to confer immunity in order to facilitate the government's investigation is the product of the balancing of the public need for the particular testimony or documentary information in question against the social cost of granting immunity and thereby precluding the possibility of criminally prosecuting an individual who has violated the criminal law. Therefore, the relative importance of particular testimony to federal law enforcement interests is a judgmental rather than a legal determination. . . .
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[7] *See Ellis* v. *United States,* 416 F.2d 791 (D.C. Cir. 1969). In *Ellis,* a trial court had rejected a witness' claim of fifth amendment privilege on the ground that the testimony could not be used against the witness in a future prosecution, regardless of the correctness of the court's ruling. The court of appeals repudiated the trial court's ruling, holding that the ruling, which was "a circular, self-fulfilling prophecy that in substance can only be viewed as a grant of immunity," was outside the scope of judicial authority. *Id.* at 796.

> Although it is correct . . . that federal courts possess inherent equitable powers over their own process in order to secure judicial proceedings from abuse, *United States* v. *United Fruit Company,* 410 F.2d 553 (5th Cir.), *cert. denied sub nom. Standard Fruit and Steamship Co.* v. *United States,* 396 U.S. 820, 90 S.Ct. 59, 24 L.Ed.2d 71 (1969), the immunity order which is issued pursuant to 18 U.S.C. § 6003 is not a matter of judicial process or judicial discretion. The immunity power originates in the legislature, *United States* v. *Bryan,* 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884 (1950); its exercise is delegated solely to the executive . . . Consequently, the determination of whether the conferral of immunity is proper in a particular case "requires intimate familiarity with the nature and details of the investigation and the background of the witness." *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 100, 84 S.Ct. 1594, 1614, 12 L.Ed.2d 678 (1964) (White, J., concurring). This is knowledge to which the federal prosecutor, and not the federal court, is privy, and it is therefore the authority of the United States Attorney to confer such extensive immunity which must be scrutinized.

(Some citations omitted.)

The Supreme Court, also, has indicated that courts have only a limited role in applying immunity statutes and no inherent power to grant immunity. In *Ullmann* v. *United States,* 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956), the Court rejected the contention that the federal immunity statute unconstitutionally required a district court to act outside of its "judicial power":

> Since the Court's duty under the [predecessor of the present immunity statute] is *only* to ascertain whether the statutory requirements are complied with by the grand jury, the United States Attorney, and the Attorney General, we have no difficulty in concluding that the district court is confined within the scope of "judicial power."

Because the district court's orders are supported by neither the immunity statute nor any authority inherent in the court, we hold that the district court lacked the power to enter the orders

compelling Franey and Hopkins to answer deposition questions and adjudging them in contempt for their continued refusal to answer. Those orders are therefore VACATED.

FRANK M. JOHNSON, Jr., Circuit Judge, dissenting:

There is no question but that the majority opinion is correct that it is beyond the authority of a district judge unilaterally to grant immunity to compel deposition testimony. *See* 18 U.S.C. § 6003; *In re Daley,* 549 F.2d 469, 479 (7th Cir.), *cert. denied,* 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 89 (1977). However, a grant of immunity under 18 U.S.C. § 6001 *et seq.* such as that received by appellants for their grand jury testimony covers any information "directly or indirectly derived" from the immunized testimony. The district judge held that because the appellants' deposition questions were based entirely on the earlier immunized testimony, the deposition testimony would be sufficiently "tainted" by the earlier testimony so as to bar its use against appellants in any subsequent criminal proceeding. In other words, the deposition testimony would be precluded as a derivative use. The majority reverses the district judge because, according to it, the district court lacked authority to make that determination.

It has always been for the courts to determine whether an assertion of the privilege is proper. *Hoffman* v. *United States,* 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951); *United States* v. *Melchor Moreno,* 536 F.2d 1042, 1046 (5th Cir. 1976). Courts have also always decided the taint question—whether evidence should be excluded as derivative of immunized testimony. *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52, 79, 84 S.Ct. 1594, 1609, 12 L.Ed.2d 678 (1964), and *Kastigar* v. *United States,* 406 U.S. 441, 460, 92 S.Ct. 1653, 1664, 32 L.Ed.2d 212 (1972), place a very high "affirmative duty" upon the prosecution "to prove that the evidence . . . is derived from a legitimate source wholly independent of the compelled testimony." This burden has been interpreted strictly against prosecutors. *See, e. g., United States* v. *Nemes,* 555 F.2d 51, 55 (2d

Cir. 1977) (lack of access to immunized testimony is not sufficient); *United States* v. *McDaniel,* 482 F.2d 305, 311-12 (8th Cir. 1973). It is my judgment that any prosecutorial use of the deposition testimony required by the district judge would, without any question, be barred as derivative of the compelled evidence.

The majority opinion is correct that the taint issue has usually arisen when prosecutors tried to introduce evidence in a criminal trial. That is to be expected. I do not think, however, that the conclusion ineluctably follows that a prospective determination of taint such as that the district judge made here exceeds judicial authority. Such prospective determinations have in the past been made. *See Appeal of Starkey,* 600 F.2d 1043, 1046 (8th Cir. 1979); *Patrick* v. *United States,* 524 F.2d 1109, 1120 (7th Cir. 1975) (Stevens, J.).[8] Since both logic and prior authority in my judgment dictate a result contrary to that reached by the majority, I respectfully dissent.

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[8] Decisions to the contrary are: *In re Folding Carton Antitrust Litigation,* 465 F.Supp. 618, 628 (Northern District of Ill.) *Rev'd on other grounds,* 609 F.2d 867 (7th Cir. 1979) (per curiam); *cf. Ellis* v. *United States,* 416 F.2d 791, 796 (D.C. Cir. 1969).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION **THIS DOCUMENT RELATES TO** **ALL ACTIONS EXCEPT:** **FRANKLIN CONTAINER CO., ET AL., CIVIL ACTION NO. H-78-671**	M.D.L. No. 310

PRETRIAL ORDER NO. 40

ORDER ADJUDGING CHARLES JEROME FRANEY TO BE IN CIVIL CONTEMPT OF COURT

Class plaintiffs have made oral application pursuant to Title 28, § 1826, United States Code, for an order adjudging one CHARLES JEROME FRANEY to be held in civil contempt of this court for his refusal, without lawful cause or excuse, to answer certain questions posed to him during the course of his oral deposition duly noticed and taken during the course of the above entitled litigation. Mr. Franey, on advice of counsel, has consistently refused to answer deposition questions as to his possible participation in an alleged price-fixing conspiracy in the corrugated container industry on the grounds that such answers might tend to incriminate him. He is an employee of Mead, a defendant in this litigation, in their corrugated division.

Mr. Franey has twice testified under grants of immunity as to the subject matter of this litigation. In August of 1977, he submitted to an interview by the Department of Justice in

connection with a grand jury investigation of this industry. That testimony was given subject to a letter grant of immunity. He subsequently testified at the trial of several of the entities indicted by the grand jury, under an additional grant of immunity pursuant to 18 U.S.C. § 6002. Clearly, Mr. Franey cannot be prosecuted in either state or federal courts using the testimony thus elicited. *Kastigar* v. *United States,* 406 U.S. 441 (1972); *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964). The immunized testimony cannot be used against him either directly or derivatively, as is made clear both by the statute itself and by the case law. *Kastigar* at 560. The question at issue at this time is whether that use immunity will be nullified if the witness now repeats his testimony at deposition.

Case law on this narrow point is quite scanty, only two reported cases having dealt with it. *In re Order of Civil Contempt against Carlos Lee Starkey,* 600 F.2d 1043 (8th Cir. 1979); *In re Folding Carton Antitrust Litigation,* 465 F. Supp. 618 (N.D. Ill. 1979), *rev'd on other grounds,* 609 F.2d 867 (7th Cir. 1979). In *Starkey,* the court found there was no possibility of a prosecutor's using such deposition testimony, since it was clearly and thoroughly derived from the immunized testimony previously given. In *Folding Carton,* although ruling on other grounds that the witness had no substantial fear of prosecution, the court stated in *dicta* that it was not willing to make a prospective determination as to whether such deposition testimony was so derived from the immunized testimony as to make it unusable by some hypothetical later prosecutor.

It is the opinion of this court that it must make that determination. During the course of the lengthy investigation into the corrugated container industry and of a three-and a half month trial in the criminal cases, hundreds of employees in the industry testified to matters which would possibly be incriminating to them if they had not been granted immunity. There have been blanket invocations of the fifth amendment by

many, many of these same witnesses when called for deposition in these civil cases. It is essential to the discovery in this case and to the orderly preparation of the case for trial that the court make some determination as to the validity of these invocations of their fifth amendment rights. The court is in no way extending the previous immunity grants; merely it is determining the validity of a refusal to answer questions, which refusal is based on an asserted fear of future prosecution. *Zicarelli* v. *New Jersey Investigation Commission,* 406 U.S. 472 (1972); *United States* v. *Melchor Moreno,* 536 F.2d 1042 (5th Cir. 1976).

The Court has therefore listened to the questions put to Mr. Franey, has studied the transcripts of his trial testimony and his interview with the government, and has ruled that all such questions may be answered without subjecting Mr. Franey to any possibility of future prosecution. This is because all the questions are either taken verbatim from the transcripts of his immunized testimony or are so closely related in subject matter and so clearly derived from the immunized testimony as to be thoroughly tainted and inadmissible against him in any conceivable future prosecution. In the extremely unlikely event that Mr. Franey is ever prosecuted by any sovereignty for matters raised by his answers to these questions, the prosecutor will have the heavy burden of proving that his case was derived wholly from independent evidence, and that burden could not be met as to this deposition testimony. Here there is no question as to whether the attorney conducting the deposition had access to the immunized testimony, a point which clearly troubled the court in *Folding Carton;* this court has read the relevant pages of the immunized testimony and ascertained that the questions asked were either taken verbatim from it or were very closely related to it. There is no question either as to whether Mr. Franey has somehow waived his immunity, as was done in *United States* v. *Kuehn,* 462 F.2d 427 (7th Cir. 1977). Mr. Franey has asserted his fifth amendment right and refused

to answer, and he will only answer under this court's order compelling him to do so.

Finally, this order does not, as has been argued by two witnesses similarly situated, convert the use immunity granted Mr. Franey into transactional immunity. Mr. Franey remains hypothetically liable to prosecution for any crimes he may reveal in his testimony; merely he cannot be incriminated as to them by any evidence taken from his testimony or derived from it, however remotely. This use immunity, which the Supreme Court has held to be coextensive with the fifth amendment privilege, is all Mr. Franey is entitled to receive under 18 U.S.C. § 6002, and this order neither enlarges nor diminishes the scope of that immunity.

THEREFORE, the said CHARLES JEROME FRANEY having knowingly and wilfully refused to obey said order which was made in the presence of said CHARLES JEROME FRANEY and his counsel in open court on March 5, 1980, as more fully appears in the record of these proceedings, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that said CHARLES JEROME FRANEY shall be and hereby is found and determined to be in civil contempt of this court, under and pursuant to the provisions of Title 28, § 1826, United States Code, and the Federal Rules of Civil Procedure, and that said CHARLES JEROME FRANEY shall be and hereby is ordered to be remanded forthwith to the custody of the Attorney General of the United States to be confined at a suitable place for a period of 60 days, or until such time that said CHARLES JEROME FRANEY is willing to testify and answer the questions which this court has ordered him to answer, whichever period may be shorter; provided, however, that the period of such confinement of the said CHARLES JEROME FRANEY shall not exceed the life of the above-entitled litigation.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that said CHARLES JEROME FRANEY shall be and hereby is fined $5,000.00, which amount shall be paid at the time this order becomes final, unless said CHARLES JEROME FRANEY is then willing to testify and answer the questions which this court has ordered him to answer.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that this order shall be stayed until 5:00 p.m. CST, March 6, 1980, and shall expire at that time unless said CHARLES JEROME FRANEY shall have theretofore filed a notice of appeal from this order to the United States Court of Appeals for the Fifth Circuit, and shall expeditiously pursue it to completion, and in the event such notice of appeal is so filed this stay shall be continued pending such appeal to the date that said court of appeals files its order or judgment respecting such appeal, at which time this stay shall expire.

DONE at Houston, Texas, this 6th day of March, 1980

JOHN V. SINGLETON, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION **THIS DOCUMENT RELATES TO ALL ACTIONS EXCEPT** **FRANKLIN CONTAINER CORP. ET AL., C. A. NO. H-78-671**	M.D.L. No. 310

PRE-TRIAL ORDER NO. 44

Plaintiffs' motion to compel production of documents from the American Paper Institute having been presented to the court and the court having studied the document requests and the briefs on this matter, it is ORDERED that American Paper Institute shall produce within fifteen days all documents not previously produced, in its possession or control, which are responsive to paragraphs 4, 6-8, 11-14, 16-21 of the subpoena duces tecum addressed to and served upon the American Paper Institute and paragraphs 4, 6-8, 11-14 and 16-23 of the subpoena duces tecum addressed to the Fourdrinier Kraft Institute and served upon the American Paper Institute, except that the documents to be produced shall be limited to those which refer either to corrugated products or to linerboard, as that term is defined in the Schedule of Documents. Class plaintiffs shall reimburse the American Paper Institute for the reasonable costs of compliance with the subpoenas.

2. The motions to withdraw their requests for exclusion from the class of Sky View Cooling Company and Cook Producing, Inc. are GRANTED. Those two entities shall now be members of the class and subject to the provisions of Pretrial Order No. 35, paragraph 5(b) and (c).

3. Alex Hopkins, a witness who gave immunized testimony in the grand jury investigation of the corrugated container industry in Houston and also in the trial of H-78-11 and H-78-12 in this court, and who has refused to answer on deposition in this civil cause verbatim questions from and questions derived from the same substantive matters as covered in his immunized testimony, in spite of this court's ruling that such answers would be so clearly and thoroughly derived from the immunized testimony that they could never be used to prosecute Mr. Hopkins and therefore that he has no legitimate fear of self-incrimination, it is hereby ORDERED, ADJUDGED, and DECREED that said Alex Hopkins shall be and hereby is found and determined to be in civil contempt of this court, under and pursuant to the provisions of Title 28, § 1826, United States Code, and the Federal Rules of Civil Procedure, and that said Alex Hopkins shall be and hereby is ordered to be remanded forthwith to the custody of the Attorney General of the United States to be confined at a suitable place for a period of 60 days, or until such time that said Alex Hopkins is willing to testify and answer the questions which this court has ordered him to answer, whichever period may be shorter; provided, however, that the period of such confinement of the said Alex Hopkins shall not exceed the life of the above-entitled litigation.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that said Alex Hopkins shall be and hereby is fined $5,000.00, which amount shall be paid at the time this order becomes final, unless said Alex Hopkins is then willing to testify and answer the questions which this court has ordered him to answer.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that this order shall be stayed until 5:00 p.m. EST, March 20, 1980, and shall expire at that time unless said Alex Hopkins shall have theretofore filed a notice of appeal from this order to the United States Court of Appeals for the Fifth Circuit and shall expeditiously pursue it to completion, and in the event such notice of appeal is so filed this stay shall be continued pending such appeal to the date that said court of appeals files its order or judgment respecting such appeal, at which time this stay shall expire.

DONE at Houston, Texas, this 20th day of March 1980.

JOHN V. SINGLETON, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

August 14, 1980

TO ALL PARTIES LISTED BELOW:

NO. 80-1284 —CORRUGATED CONTAINER ANTI
80-1307 TRUST LITIGATION,
80-1338 CHARLES J. FRANEY, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By _____
Deputy Clerk

cc: Mr. Robert H. Singleton
Mr. Harold C. Gaebe, Jr.
Mr. Harold F. Baker
Mr. Stephen D. Susman
Mr. Barry T. McNamara
Mr. Jerry G. Hill